

BEFORE THE HUMAN RIGHTS COMMISSION
OF THE STATE OF MONTANA

DAVID LERAAS,

Charging Party,

-v-

BURLINGTON NORTHERN SANTE FE
RAILROAD,

Respondent.

Case No.: 0051011181

**ORDER AFFIRMING FINAL
AGENCY DECISION**

On January 4, 2006, the Department of Labor and Industry's Hearings Bureau issued a Final Agency Decision in the above-captioned matter. Charging Party, David Leraas (Leraas) filed an appeal with the Montana Human Rights Commission (Commission). The parties requested oral argument. Jeff Hedger appeared and argued on behalf of Respondent, Burlington Northern Santa Fe (BNSF). Brian Bramblett appeared and argued on behalf of Charging Party, Leraas. The Commission considered the matter on May 8, 2006.

In briefing, Leraas asserted that Finding of Fact No. 20 in the Final Agency Decision was not supported by the record and thus, it cannot be relied upon by the Commission. Leraas asserted that BNSF's physician, Dr. Jarrard (Jarrard), determined that Leraas had provided BNSF with inconsistent information regarding his medical condition in a medical questionnaire. Leraas asserted that Jarrard did not have Leraas's medical questionnaire or other occupational information reports in his possession. Since

Jarrard did not have this information, Jarrard could not rightly discredit Leraas's reports regarding his condition and work ability.

Next, Leraas's asserted the Finding of Fact No. 24 in Final Agency Decision was not supported by competent substantial evidence. In Finding of Fact No. 24, the Hearings Officer found that Jarrard relied on Leraas's history of non-compliance (with lifting restrictions) and determined that Leraas's non-compliance made it more likely than not that Leraas would have a new claim or injury or reportable injury if he lifted over 50 pounds. Leraas asserts that Jarrard could not have been aware - at the time, he made his decision - that Leraas had previously exceeded a lifting restriction. Therefore, Jarrard's testimony at the prior-level hearing regarding Leraas's non-compliance with a lifting restriction was based on facts learned subsequent to reaching his determination. Leraas contends that employers are not permitted to use after-acquired evidence to support an adverse employment action, thus Finding of Fact No. 24 must be rejected.

Similarly, Leraas argued that the opinion and testimony of Dr. Ross (Ross) should not be allowed to support Jarrard's opinion. Jarrard had not spoken with Ross before disqualifying Leraas from employment. Since an employer is not permitted to use after-acquired evidence to support an adverse employment action, Leraas asserted that the Hearings Officer abused his discretion in allowing this evidence to support BNSF's "direct threat" defense.

Finally, Leraas contended that it was error for the Hearings Officer to conclude that BNSF's decision to disqualify Leraas from employment was based upon a reasonable disability based distinction. Leraas argued that since BNSF raised the "direct threat" defense, it had the burden of showing that Leraas's condition presented a risk of substantial harm to himself and others if he worked as a conductor. Since BNSF

did not perform an adequate individualized in-person assessment of Leraas's abilities, it could not establish a direct threat before taking the adverse employment action.

After careful and due consideration, the Commission concludes that the Final Agency Decision in this matter is supported by competent substantial evidence and complies with essential requirements of law. The Commission **affirms** the Final Agency Decision. Leraas's appeal is denied and the Commission adopts and incorporates the Final Agency Decision issued by the Hearings Bureau.

A person who has exhausted all administrative remedies available within an agency and who is aggrieved by a final decision in a contested case is entitled to file a petition for judicial review within 30 days after service of the final agency decision in the district where the petitioner resides, where petitioner maintains its principal office, or where the agency maintains its principal office. See Mont. Code Ann. § 2-4-702.

DATED this ____ day of June 2006.

Chair Franke Wilmer
Human Rights Commission

CERTIFICATE OF SERVICE

The undersigned employee of the Human Rights Bureau certifies that a true copy of the forgoing Human Rights Commission ORDER was served on the following persons by U.S. mail, postage prepaid, on June ____ 2006.

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